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ALEXANDER L. STEVAS,
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No. 84-1166

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1984

MALCOLM D. WEISS, D.O.,
Petitioner,

v.

YORK HOSPITAL, THE MEDICAL AND DENTAL STAFF OF YORK HOSPITAL, S. PHILIP LAUCKS, M.D., HAROLD H. MacDOUGALL, M.D., IAN L. MacKENZIE, M.D., JOHN P. WHITELY, M.D., SAMUEL W. DEISHER, M.D., JACK A. KLINE, M.D., LOIS M. KUSHNER, M.D., IVAN L. BUTLER, M.D., GARY ARDISON, M.D., and THOMAS L. BAUER, M.D.,
Respondents.

RESPONDENTS' BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

Whether the court of appeals correctly held that, under settled principles of monopolization law, there is no evidence that York Hospital willfully acquired or maintained monopoly power in any relevant market and that York Hospital, therefore, did not violate section 2 of the Sherman Act.

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Respondents, York Hospital, The Medical and Dental Staff of York Hospital (the "York Medical Staff"), S. Philip Laucks, M.D., Harold H. MacDougall, M.D., Ian L. MacKenzie, M.D., John P. Whitely, M.D., Samuel W. Deisher, M.D., Jack A. Kline, M.D., Lois M. Kushner, M.D., Ivan L. Butler, M.D., Gary Ardison, M.D., and Thomas L. Bauer, M.D., respectfully pray that this Court deny the petition for a writ of certiorari filed by Malcolm D. Weiss, D.O. ("Weiss"), which seeks review of the judg-

ment and opinion of the United States Court of Appeals for the Third Circuit entered on September 27, 1984 insofar as it held that York Hospital did not violate section 2 of the Sherman Act.[1]

COUNTERSTATEMENT OF THE CASE

I. Preliminary.

Weiss's petition asks this Court to review the court of appeals' application of settled monopolization law to the facts of record in this case and to reverse the court of appeals' conclusion "that there is *no evidence* that York [Hospital] 'willfully' maintained its monopoly position." *Weiss v. York Hospital*, 745 F.2d 786, 828 (3d Cir. 1984) (emphasis supplied). (Pet. A-90).[2] Weiss's petition presents no significant legal questions, and the petition satisfies none of the "special and important reasons" customarily considered by this Court for granting certiorari.

II. Nature of the case.

Weiss, a doctor of osteopathy and a general (or family) practitioner, filed this antitrust action on behalf of himself and a class of the 92 other osteopathic physicians practicing in and around York, Pennsylvania. Weiss sought treble damages and injunctive relief against York Hospital, the York Medical Staff, and ten individual physician members of the York Medical Staff, charging defendants, among

1. York Hospital Foundation is the parent company of York Hospital. (York Hospital has no subsidiaries or affiliates.) *See* Supreme Court Rule 28.1.

Because Weiss's petition seeks review only of that portion of the judgment and opinion of the court of appeals that exonerated York Hospital from liability under section 2 of the Sherman Act, 15 U.S.C § 2, the York Medical Staff and the ten individual physician defendants, named as respondents herein, have no interest in the outcome of this petition. *See* Supreme Court Rule 19.6.

2. References in this form are to pages in the Appendix to Weiss's petition. The text of Weiss's petition is cited as "Weiss Pet."

other things, with monopolization in violation of section 2 of the Sherman Act.[3]

Weiss claimed that defendants abused their monopoly power in the delivery of inpatient hospital health care services in the area surrounding York Hospital called the York Medical Service Area (the "York MSA"). According to Weiss, by treating osteopaths' applications for staff privileges in a discriminatory manner, defendants excluded osteopaths from the York Medical Staff. It was the treatment and denial of Weiss's application for staff privileges that formed the sole factual basis for the claim of Weiss and the class. (The six other osteopaths who had completed their applications by the time of trial were all granted staff privileges. *Weiss v. York Hospital*, 548 F. Supp. 1048, 1053 (M.D. Pa. 1982) (Findings of Fact Nos. 36-40). (Pet. A-103).)

III. Factual Background.[4]

A. York Hospital and Memorial Osteopathic Hospital.

There are two hospitals located in the York MSA.[5] One is York Hospital, a nonprofit community hospital, and the other is Memorial Osteopathic Hospital ("Memorial Hos-

3. Weiss also charged defendants with conspiring to deny osteopaths admission to the York Medical Staff and refusing to deal with Weiss and the class in violation of section 1 of the Sherman Act. The court of appeals concluded that the York Medical Staff (and no other defendant) violated section 1 of the Sherman Act, finding that the York Medical Staff, as a matter of law, is a "combination" under section 1 and that the discrimination at issue was the equivalent of a concerted refusal to deal or group boycott and was consequently per se illegal. The York Medical Staff has filed a separate petition for a writ of certiorari to review the judgment against it under section 1 of the Sherman Act (No. 84-1187).

4. A more complete description of the factual background of this case appears in the York Medical Staff's petition for certiorari docketed at No. 84-1187. That petition is cited as "York Medical Staff Pet."

5. There are 20 other hospitals in the six-county area surrounding York Hospital. (5916a-5917a). (References in this form are to the Joint Appendix filed in the court of appeals.)

pital"). York Hospital had a market share of 80 percent of the patient days of hospitalization in the York MSA and York Hospital offered certain services and facilities that Memorial Hospital did not offer. *Weiss*, 745 F.2d at 793-94. (Pet. A-9 to A-10). Weiss's expert witness, Ted E. Frech, Ph.D., relied upon these so-called "specialized" services and facilities of York Hospital to support Weiss's theory that York Hospital had monopoly power:

> [T]he fact that York [Hospital] has many of these facilities that Memorial [Hospital] doesn't, it means for certain types of consumers, York [Hospital] is just a monopolist and they really don't have the option of going to Memorial [Hospital] . . . because it doesn't have a crucial service.

(3869a-3870a).

Weiss conceded at trial that York Hospital acquired its purported monopoly power lawfully. *See Weiss*, 745 F.2d at 828. (Pet. A-88). In addition, Frech testified that many of the "specialized" services and facilities offered by York Hospital were available elsewhere in the York MSA. Frech further testified that neither York Hospital nor the York Medical Staff had done anything to prevent Memorial Hospital from offering these services and facilities and that they were not available at Memorial Hospital because Memorial Hospital "just chose not to provide [them]." (3965a-3969a).

With respect to York Hospital's intent to maintain its purported monopoly power, Frech also testified it was against the economic interests of York Hospital to exclude physicians from the York Medical Staff:

> The hospital as an institution gains from anything that increases the demand for its facilities. And naturally, having more doctors, is going to increase demand for the facilities. So generally, the hospital per se, as an institution, would like to admit all physicians, as many as possible, [to] get the maximum demand for the hospital's part.

(3871a-3872a). Frech continued:

> Q. [A]m I correct that it is to the disadvantage of York Hospital to keep physicians off its staff as you understand it?
>
> A. It would seem so.

(3935a).[6]

B. York Hospital's treatment of osteopaths' applications for staff privileges.

Weiss and all members of the class were actively engaged in the provision of health care services in the York MSA. Weiss and all members of the class also had, or were eligible to have, staff privileges at Memorial Hospital. (1505a-1526a; 3462a; 3598a; 3743a; 3878a-3880a; 4362a).

Weiss and Michael Zittle, D.O. ("Zittle") were the first two osteopaths to seek staff privileges at York Hospital, both applying in 1976.[7] Although these initial applications by osteopaths were processed more carefully than applications by allopaths, this "caution" (4162a) (or, according to Weiss, "discrimination") was dictated by York Hospital's and the York Medical Staff's relative unfamiliarity with the educational and training backgrounds of osteopathic applicants and their references. (5240a-5241a).

Weiss's application was considered within this framework. References were gathered, and information sharply critical of Weiss's professional competence and ability to work with others in a hospital setting was received from osteopaths and allopaths alike. *See* York Medical Staff Pet. at 6. In view of these critical comments, the York Medical

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6. Also, Frech did not testify that York Hospital ever misused its purported power by overcharging patients for these services, stating it was "unanswerable" whether York Hospital had ever raised prices as an exercise of monopoly power. (3955a).

7. Staff privileges were granted to Zittle on the same day Weiss's application was denied.

Staff (through its Executive Committee and a Judicial Review Committee) recommended to York Hospital's lay Board of Directors that Weiss's application be denied. Taking into account this information critical of Weiss and the negative recommendation of the York Medical Staff, York Hospital's Board of Directors unanimously voted to deny Weiss's application for staff privileges because of the Board's concerns about Weiss's "uncooperative nature" and about the adverse impact his appointment would have on the quality of patient care at York Hospital. (1691a-1693a; 2067a; 2091a).

Thus, as with all staff privileges decisions at York Hospital,[8] York Hospital's Board of Directors made the staff privileges decision respecting Weiss, and the York Medical Staff, through certain committees, served in an advisory capacity to the Board. This process at York Hospital was consistent with the legal requirement that medical staffs advise, and make recommendations to, hospital boards of directors and that the boards of directors make the ultimate staff privileges decisions.[9] *See* York Medical Staff Pet. at 7-9.

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8. The York Medical Staff Bylaws provide that the York Medical Staff's Credentials Committee, Executive Committee, and Judicial Review Committee are to review staff privileges applications and to recommend action to the York Hospital Board of Directors, which is to make the "definitive" decision. (1562a-1563a).

9. Federal regulations, national accreditation organization standards, and state regulatory schemes in more than 40 states, including Pennsylvania, require medical staffs to advise, and make recommendations to, hospital boards of directors respecting the boards' staff privileges decisions and require that the boards of directors be vested with the ultimate authority and responsibility for all such decisions. *See* 42 C.F.R. §§ 405.1021, 405.1023 (1984); Joint Commission on Accreditation of Hospitals, *Accreditation Manual for Hospitals* (Governing Body and Medical Staff Standards) (pertinent portions reproduced in York Medical Staff Pet. Appendix H, pp. A-142 to A-151); 28 Pa. Code §§ 103.1, 103.3, 103.4, 107.2, 107.5, 107.12, 107.26 (1984); Summary of State Regulation of Hospital Medical Staffs (York Medical Staff Pet. Appendix J, pp. A-163 to A-175).

IV. Conclusions of the courts below.

Following a bifurcated jury trial on liability and a hearing on equitable relief, the district court entered its opinion, order, and judgment. The district court concluded that York Hospital alone was liable to Weiss and the class under section 2 of the Sherman Act, and the court entered injunctive relief in favor of the class.

The absence of any Sherman Act section 2 liability on the part of the York Medical Staff and the ten individual defendants was based upon the jury's findings that: (i) the York Medical Staff did not have the power to exclude competitors from the relevant market and did not unreasonably use its power to control prices to exclude Weiss or the class from York Hospital staff privileges; (ii) the ten individual defendants did not have the power to control prices in, or exclude competitors from, the relevant market; and (iii) neither the York Medical Staff nor any of the ten individual defendants had the intent or purpose to acquire the power to control prices in, or exclude competitors from, the relevant market. *Weiss*, 548 F. Supp. at 1052 (Finding of Fact No. 19), 1055-56. (Pet. A-101, A-107 to A-111).

The court of appeals reversed the district court's determination that York Hospital violated section 2 of the Sherman Act on the basis of a straightforward application of this Court's decision in *United States v. Grinnell Corp.*, 384 U.S. 563 (1966). The court of appeals concluded there was "no evidence" that York Hospital willfully maintained its purported monopoly position. *Weiss*, 745 F.2d at 828. (Pet. A-90). To the contrary, the court of appeals found "uncontradicted evidence" that excluding osteopaths from York Hospital (the only monopolistic conduct asserted by Weiss) would *weaken* York Hospital's purported monopoly position and would, therefore, be inconsistent with the *maintenance* of monopoly power:

> On this point, the uncontradicted evidence of both the plaintiffs' and the defendants' experts was that York [Hospital], like any hospital, would maximize its rev-

> enues by giving staff privileges to every qualified doctor who applied. . . . Excluding D.O.s on the other hand, is likely to weaken York[] [Hospital's] monopoly position in the long run, since a potential rival, such as Memorial Hospital, would have an incentive to provide competing services for the D.O.s excluded from York [Hospital].

Id. (Pet. A-89).

The court of appeals also concluded the alleged anticompetitive motives of allopaths to exclude osteopaths could not be imputed to York Hospital to establish that York Hospital willfully maintained its purported monopoly power, given that the exclusion of osteopaths would be contradictory to the economic interests of York Hospital and would not aid the Hospital in maintaining monopoly power in the relevant market. *Id.* (Pet. A-90).

REASONS FOR DENYING THE WRIT

I. The conclusion of the court of appeals that York Hospital did not violate section 2 of the Sherman Act was based upon application of settled monopolization law to the facts of record.

The offense of monopolization under section 2 of the Sherman Act has two elements: "(1) the possession of monopoly power in the relevant market and (2) the willful acquisition or maintenance of that power . . . ." *Grinnell Corp.*, 384 U.S. at 570-71. The court of appeals applied this rule of law to the factual record in this case and concluded there was "no evidence" to support a finding of willful maintenance of monopoly power.[10] Weiss's petition challenges this factual conclusion.

The court of appeals reached the only conclusion open to it on the basis of the record herein. There is no direct evidence that York Hospital willfully maintained its purported monopoly power. The only issue is whether there is

10. As already stated, Weiss conceded that York Hospital lawfully acquired its purported monopoly power.

any evidence from which a fact finder could infer the requisite intent. Given the "uncontradicted evidence" that excluding osteopaths would weaken York Hospital's purported monopoly position (and that York Hospital would maximize its revenues by granting staff privileges to every qualified applicant), the court of appeals correctly concluded it could not be inferred that York Hospital's alleged exclusion of osteopaths constituted intentional maintenance of monopoly power.

Accordingly, the court of appeals' holding that York Hospital did not violate section 2 of the Sherman Act was legally and factually correct. *Accord California Computer Products, Inc. v. International Business Machines Corp.*, 613 F.2d 727, 742-46 (9th Cir. 1979); *Deesen v. Professional Golfers' Ass'n of America*, 358 F.2d 165, 171 (9th Cir.), *cert. denied*, 385 U.S. 846 (1966); *Pontius v. Children's Hospital*, 552 F. Supp. 1352, 1377-78 (W.D. Pa. 1982).

II. None of the reasons asserted by Weiss justifies granting the writ.

Weiss attempts to transform the court of appeals' routine, fact-based decision as to section 2 of the Sherman Act into a case of significant legal import. Weiss's petition appears to assert three reasons for issuing a writ of certiorari:

> (i) The court of appeals' factual determination is, in reality, a legal conclusion that a monopolist's refusal to deal with a noncompetitor cannot violate section 2 of the Sherman Act, which conclusion Weiss argues conflicts with decisions in four other circuits. *See* Weiss Pet. at 16-20.
>
> (ii) The court of appeals' factual determination is wrong because the anticompetitive motives of the York Medical Staff (allegedly established by the jury's finding that the York Medical Staff discriminated against osteopaths) can be imputed to York Hospital to show

that York Hospital willfully maintained its purported monopoly power. *See* Weiss Pet. at 20-23.

(iii) The court of appeals' factual determination is also wrong because there is evidence from which a jury could infer that York Hospital had the requisite monopolistic intent vis-a-vis its competitor, Memorial Hospital, a nonparty to this litigation. *See* Weiss Pet. at 24-25.

Each of these reasons lacks merit.

A. York Hospital's alleged discrimination against osteopaths does not violate section 2 of the Sherman Act.

Weiss's first argument relies upon what he claims is a split of authority among the courts of appeals on whether a monopolist has a duty to deal with noncompetitors. Weiss Pet. at 17-18. Contrary to Weiss's argument, there is no circuit split on this issue; the unanimous rule is that a monopolist does not have a duty to deal with noncompetitors.[11]

1. Absence of a circuit split.

Weiss inaccurately argues that the precedent concerning refusals to deal by monopolists is a "legal quagmire of difficult and conflicting judgments." Weiss Pet. at 16. Instead of a conflict among the circuits, as the Sixth Circuit has noted, "there is a discernable uniformity of holdings of illegal refusals-to-deal in various factual contexts." *Byars v. Bluff City News Co.*, 609 F.2d 843, 857 (6th Cir. 1980).

11. Weiss also points to a split within the Fifth Circuit on whether a duty to deal can be imposed upon a single monopolist or whether concerted action is necessary. Weiss Pet. at 17. Although York Hospital does not see any conflict in the Fifth Circuit's decisions on this question, any such conflict would be immaterial. This Court ordinarily does not exercise its certiorari jurisdiction to review intra-circuit conflicts. *See, e.g., Davis v. United States*, 417 U.S. 333, 340 (1974). Moreover, neither the court of appeals nor York Hospital has suggested that concerted action is a prerequisite for liability under section 2 of the Sherman Act.

Weiss is correct that decisions in the Second, Third, Fourth, and Sixth Circuits expressly hold that a monopolist does not have a duty to deal with noncompetitors of the monopolist.[12] But there is no circuit conflict. Each of the purportedly conflicting decisions cited by Weiss involves a monopolist's refusal to deal with a direct competitor (either in the monopolist's principal market or in an adjacent market in which the monopolist also competes):[13]

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12. *Official Airline Guides, Inc. v. Federal Trade Commission*, 630 F.2d 920, 925-28 (2d Cir. 1980), *cert. denied*, 450 U.S. 917 (1981); *Mannington Mills, Inc. v. Congoleum Industries, Inc.*, 610 F.2d 1059, 1069 (3d Cir. 1979); *Shapiro v. General Motors Corp.*, 472 F. Supp. 636, 644-46 (D. Md. 1979), *aff'd mem.* 636 F.2d 1214 (4th Cir. 1980), *cert. denied*, 451 U.S. 909 (1981); *Smith v. Northern Michigan Hospitals, Inc.*, 703 F.2d 942, 955 (6th Cir. 1983). (The Sixth Circuit's decision in *Smith* involves a staff privileges case in which the court of appeals ordered a pretrial dismissal of the Sherman Act section 2 claims against the hospital defendant because the hospital did not compete with the plaintiff physicians.) *See also Almeda Mall, Inc. v. Houston Lighting & Power Co.*, 615 F.2d 343, 351-53 (5th Cir.) (no "antitrust injury" when a monopolist refuses to deal with a noncompetitor), *cert. denied*, 449 U.S. 870 (1980).

13. *Home Placement Service, Inc. v. Providence Journal Co.*, 682 F.2d 274 (1st Cir. 1982), *cert. denied*, 460 U.S. 1028 (1983); *LaPeyre v. Federal Trade Commission*, 366 F.2d 117 (5th Cir. 1966); *Byars v. Bluff City News Co.*, 609 F.2d 843 (6th Cir. 1980); *Hecht v. Pro-Football, Inc.*, 570 F.2d 982 (D.C. Cir. 1977), *cert. denied*, 436 U.S. 956 (1978).

The "duty to deal" cases cited by Weiss in the introductory section of his petition similarly do not support Weiss's argument, as they too only involve refusals to deal directed at competitors. *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973) (monopolist's refusal to deal with municipalities that wished to compete with it at the retail level of distribution); *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951) (monopolist's refusal to deal with advertisers who advertised on a competing radio station); *Associated Press v. United States*, 326 U.S. 1 (1945) (joint refusal to deal with competing publishers); *Eastman Kodak Co. v. Southern Photo Materials Co.*, 273 U.S. 359 (1927) (monopolist's refusal to deal with a competitor at the retail level of distribution); *United States v. Terminal Railroad Ass'n of St. Louis*, 224 U.S. 383 (1912) (joint refusal to deal with competing railroads).

—In *Home Placement Service, Inc.*, the defendant monopolist newspaper refused to accept advertising from the plaintiff, which was a rental referral agency in "direct competition" with the defendant newspaper for advertising. *Home Placement Service, Inc.*, 682 F.2d at 278.

—In *LaPeyre*, the defendant monopolist manufacturer of shrimp-peeling machinery leased the equipment to shrimp canners in the Northwest at higher rates then he charged canners on the Gulf Coast. This discrimination was found to have an effect on competition in the shrimp canning market, a market in which the defendant was also a direct competitor. *LaPeyre*, 366 F.2d at 118.

—In *Byars*, the defendant monopolist distributor of periodicals terminated its distribution arrangement with the plaintiff distributor, an individual whom the court found to be a direct competitor of the defendant monopolist.[14] *Byars*, 609 F.2d at 854.

—In *Hecht*, the defendant football team (the Washington Redskins) enforced a restrictive covenant in its lease of R.F.K. Stadium to prevent a competing football team from the fledgling American Football League from using the stadium. *Hecht*, 570 F.2d at 987.

Thus, as the Sixth Circuit observed in *Byars*, the decisions in this area are quite uniform, and Weiss's circuit split is illusory.

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14. In *Byars*, the district court ultimately determined that, even though plaintiff and defendant were direct competitors, "no abuse of Bluff City's monopoly power occurred," a conclusion that was affirmed by the Sixth Circuit. *Byars v. Bluff City News Co.*, 683 F.2d 981, 983 (6th Cir. 1982).

2. The sound reasons underlying the unanimity of opinion.

There are several sound reasons why section 2 of the Sherman Act does not and should not impose a duty on monopolists to deal with noncompetitors. *See* III P. Areeda & D. Turner, *Antitrust Law* ¶ 736 (1978 & Supp. 1982). To name a few, the language of section 2 cannot be stretched to label a refusal to deal "monopolization," when the refusal will not increase the monopolist's market power or its own position in any market. In addition, the danger of abuse by monopolists refusing to deal with noncompetitors is quite low inasmuch as there is nothing to suggest that monopolists will act against their economic interests and arbitrarily refuse to deal with noncompetitors. There also is no need to extend the antitrust laws to this context. There are common law remedies and state and federal legislation to protect persons injured by allegedly improper refusals to deal by monopolists.[15]

3. Essential facilities doctrine.

Weiss makes numerous references to the "essential facilities" doctrine throughout his petition and may be suggesting York Hospital should be liable under section 2 of the Sherman Act by virtue of that doctrine. The essential facilities doctrine, however, is not applicable in this case.

A prerequisite for application of the essential facilities doctrine is that those who control access to an essential facility deny their competitors access to that facility. *E.g.*, *Aspen Highlands Skiing Corp. v. Aspen Skiing Co.*, 738 F.2d 1509, 1519 (10th Cir.) (quoting *Byars*, 609 F.2d at 856), *cert. granted on other grounds*, 105 S. Ct. 562 (1984);

15. For example, in the staff privileges area, aggrieved physicians have a broad range of state-law remedies available to redress perceived injuries resulting from allegedly improper discrimination or denials of staff privileges. *See* York Medical Staff Pet. at 18 n.24. Other industries also have protective remedies. *See, e.g.*, 15 U.S.C. § 1222 (protecting automobile dealers from manufacturer refusals to deal); 7 U.S.C. § 2303 (protecting farmers from food processor refusals to deal).

MCI Communications Corp. v. American Telephone & Telegraph Co., 708 F.2d 1081, 1132-33 (7th Cir.), *cert. denied*, 104 S. Ct. 234 (1983); *Mid-South Grizzlies v. National Football League*, 550 F. Supp. 558, 569-70 (E.D. Pa. 1982), *aff'd*, 720 F.2d 772 (3d Cir. 1983), *cert. denied*, 104 S. Ct. 2657 (1984); 16A J. von Kalinowski, *Antitrust Laws & Trade Regulation* § 6C.02[3], at 6C-47 (1984).

Here, the evidence is unequivocal that York Hospital's lay Board of Directors (which is not composed of competitors of osteopaths) made the staff privileges decisions at York Hospital (including the decision respecting Weiss) and thus controlled access to the Hospital. *See supra* p. 6. There is no evidence that the York Medical Staff or any of its members controlled access to York Hospital or that any competitors of osteopaths did so in this case.[16] In fact, the jury specifically found that neither the York Medical Staff nor any individual defendant member of the York Medical Staff had the "power to exclude competitors from the relevant market." Special Verdict Questions Nos. 18 & 19. (6255a-6256a).[17]

Furthermore, the question whether there has been a Sherman Act section 2 violation under the essential facilities doctrine is a factual issue to be decided by the fact finder. *E.g.*, *Byars*, 609 F.2d at 860; *Hecht*, 570 F.2d at 993. In this case, however, there has been no such finding. Indeed, the jury was not given an essential facilities doctrine instruction, nor was it even instructed as to the definition of an essential facility. The jury also was not asked to answer any special verdict questions as to whether York Hospital was an essential facility or whether the alleged

16. While the court of appeals assumed, in the context of its Sherman Act section 1 analysis, that the York Medical Staff controlled York Hospital's staff privileges decisions, that assumption was not based upon any evidence, but rather was based upon two law review articles. *Weiss*, 745 F.2d at 796 n.14, 819 n.57. (Pet. A-15, A-67 to A-68).

17. The jury also found that York Hospital did not conspire with any member of the York Medical Staff or with anyone else to exclude osteopaths. (6250a).

exclusion of osteopaths was a violation of section 2 under the essential facilities doctrine. Similarly, there were no essential facilities findings by the district court.

This is particularly fatal in this case in light of the evidence that York Hospital was not an "essential facility." The uncontradicted testimony is that many of the services and facilities available at York Hospital, but not at Memorial Hospital, are also available elsewhere in York County. In addition, there was no evidence that duplication of these services and facilities would be "economically infeasible." *Hecht*, 570 F.2d at 992. Frech testified Memorial Hospital "just chose not to provide [these services and facilities]." (3965a-3969a). Moreover, given that Weiss and the class actively provide health care services in the York MSA, it does not appear that the alleged exclusion of osteopaths from York Hospital has inflicted "a severe handicap" on osteopaths. *Hecht*, 570 F.2d at 992.

Any essential facilities argument must fail for another reason as well. In the absence of any jury instructions or findings under the essential facilities doctrine, and in the absence of any request by plaintiffs for such instructions or special verdict questions, any essential facilities argument has not been preserved for review by this Court. Fed. R. Civ. P. 51. *E.g.*, *Board of Water Works Trustees of the City of Des Moines v. Alvord, Burdick & Howson*, 706 F.2d 820, 824 (8th Cir. 1983).[18]

B. The intent of the York Medical Staff cannot be imputed to York Hospital to find a violation of section 2 of the Sherman Act.

Weiss also argues that the alleged anticompetitive intent of the York Medical Staff (which was itself exonerated

18. As one court has pointed out, given that human lives are at stake, it also would be "singularly inappropriate" to apply the essential facilities doctrine in the hospital staff privileges context, and the doctrine is, therefore, "inapplicable to hospital staff privileges decisions." *Pontius*, 552 F. Supp. at 1370.

from any section 2 liability) can be "imputed" to York Hospital to establish that York Hospital willfully maintained its purported monopoly power. This is the same argument Weiss made to the court of appeals and which the court properly rejected.

The evidence unequivocally shows that any anti-competitive motives individual allopaths allegedly may have had for excluding osteopaths were antithetical to the maintenance of York Hospital's purported monopoly power. *Weiss*, 745 F.2d at 828. (Pet. A-89). The court of appeals, therefore, was correct in concluding it would be anomalous to allow any alleged exclusionary motives of allopaths to satisfy Weiss's burden of establishing that York Hospital willfully maintained its purported monopoly power.[19]

Weiss relies upon this Court's decision in *American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp.*, 456 U.S. 556 (1982), to support his imputation of intent argument. That case, however, is inapposite. *Hydrolevel Corp.* held only that a principal can be held "liable under the antitrust laws for the antitrust violations of its agents." *Id.* at 577. In this case, the York Medical Staff was *exonerated* from any liability under section 2.

C. The court of appeals' factual analysis was correct.

Weiss is thus left with his final argument — that the court of appeals was wrong in concluding there was no evidence York Hospital willfully maintained its purported monopoly power because there was some testimony that excluding osteopaths might help York Hospital compete

19. Moreover, there is no finding of *monopolistic* intent on the part of the York Medical Staff that can be imputed to York Hospital. Indeed, in response to the only special verdict questions relating to this issue, the jury specifically found that neither the York Medical Staff nor any of the ten individual defendant members of the York Medical Staff had the intent or purpose to acquire the power to control prices in, or exclude competitors from, the relevant market. Special Verdict Questions Nos. 26 & 27. (6263a-6264a).

against its direct competitor, Memorial Hospital. This is, of course, a purely factual issue, with no implications beyond this case, and is, therefore, not the type of issue that ordinarily merits review by this Court. *See, e.g., Southern Power Co. v. North Carolina Public Service Co.*, 263 U.S. 508, 509 (1924). The court of appeals, in any event, reached the proper factual conclusion, and this Court's intervention is, therefore, unnecessary.

The testimony relied upon by Weiss was Frech's speculation that, if York Hospital admitted osteopaths to its facilities, it "may actually benefit osteopaths in general and through osteopaths in general, Memorial . . . Hospital." (Pet. A-156). Frech cautioned: "I'm not saying that necessarily would happen, but that seems *possible*." (Pet. A-156) (emphasis supplied).

This speculation does not qualify as the type of evidence that would permit a jury to infer monopolistic intent. A jury verdict can be sustained only if the record contains "substantial evidence fairly tending to support the verdict." *Stewart v. Thigpen*, 730 F.2d 1002, 1007 (5th Cir. 1984). "Substantial evidence," however, 'cannot be based upon an inference drawn from facts . . . which raise only a conjecture or a *possibility*." *Woods v. United States*, 724 F.2d 1444, 1451 (9th Cir. 1984) (emphasis supplied).

Moreover, Frech himself contradicted his speculative testimony with definitive and unqualified testimony that York Hospital would like to admit as many physicians (both osteopaths and allopaths) as possible to generate the "maximum demand" for York Hospital's facilities. *See Weiss*, 745 F.2d at 828 (Pet. A-89); *supra* pp. 4-5. Weiss and the class cannot rely upon their own expert's self-contradicted testimony to sustain their burden of proving monopolistic intent. *See, e.g., Rewis v. United States*, 503 F.2d 1202, 1205-06 (5th Cir. 1974).[20]

20. The patent insufficiency of the evidence relied upon by Weiss is illuminated by comparison to the evidence in *Lorain Journal Co. v. United States*, 342 U.S. 143 (1951), the principal case cited by Weiss. In *Lorain Journal Co.*, there was direct evidence that: the defendant

Even assuming *arguendo* the court of appeals reached an incorrect factual conclusion, Weiss's petition should still be denied. Weiss's argument relates to the sufficiency of the evidence to support the inference that York Hospital intended to monopolize the market for inpatient hospital facilities and thereby intended to injure Memorial Hospital. But Weiss and the class of osteopaths do not have standing to pursue this claim. The claim, if any, belongs to Memorial Hospital.

This Court's recent decisions have emphasized that antitrust standing is not limitless and that plaintiffs whose injuries are too "remote" from the asserted antitrust violation will be denied antitrust standing. *Associated General Contractors of California, Inc. v. California State Council of Carpenters*, 459 U.S. 519, 537-46 (1983); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 476-78 (1982). Even accepting Frech's speculative testimony, the relevant injury for purposes of section 2 of the Sherman Act would be to Memorial Hospital. Weiss concedes that he and the class are only remote targets of York Hospital's alleged monopolization of the market for inpatient hospital facilities.

Furthermore, York Hospital's purported monopoly power was allegedly generated from its possession of certain "specialized" services and facilities, *see supra* p. 4, but Weiss failed to prove that he, or any member of the

NOTES *(Continued)*

newspaper "had executed a plan conceived to eliminate the threat of competition from the [competing radio] station"; as part of this plan, the defendant newspaper explicitly conditioned purchase of advertising on receipt of a commitment not to advertise with the competing radio station; and the defendant newspaper monitored the radio station's programs to determine the identity of its advertisers, which were then cut off from the newspaper. *Id.* at 148-49.

21. Any reliance upon the *McCready* decision to cure this defect would be misplaced, as this Court's holding in that case was based upon the plaintiff's status as a *consumer* in the health insurance market, *McCready*, 457 U.S. at 480-81, and the osteopaths in this case are "neither . . . consumer[s] nor . . . competitor[s] in the market in which trade was restrained." *Associated General Contractors*, 459 U.S. at 539.

CONCLUSION

For the foregoing reasons, this Court should deny Weiss's petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Third Circuit.

Respectfully submitted,

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